

Supreme Court of the State of New York

and of the

No. 2119

**CITY OF FRANKLIN**  
*Petitioner*

v.

**COLEMAN BROS. CORPORATION**  
*Respondent*

**CITY OF FRANKLIN**  
*Petitioner*

*Appellee*

**COLEMAN BROS. CORPORATION**  
*Respondent*

PETITION FOR REVIEW AND WRIT OF CERTIORARI

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OCTOBER TERM 1946

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## PETITION FOR REVIEW ON WRIT OF CERTIORARI

Considering itself aggrieved by the final decision of the United States Circuit Court of Appeals for the first circuit in the above entitled actions, your petitioner, the City of Franklin, New Hampshire, by its counsel, prays that a writ of certiorari in the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

## STATEMENT OF THE MATTER INVOLVED

In these proceedings Coleman Bros., Corporation, a Massachusetts corporation duly established by law, is seeking from the City of Franklin, a municipal corporation duly established under the laws of the State of New Hampshire, the sum of twelve thousand two hundred fifty-seven dollars (\$12,257.00) which it

alleges has been unlawfully and illegally collected by the City of Franklin on personal property situated on land owned by the Government of the United States. Specifically this sum represents assessments against the respondent corporation for the years 1940 and 1941. The above entitled cause was instituted in the District Court for the District of New Hampshire on May 17, 1944. Prior to trial your petitioner seasonably moved for a dismissal of the action on the ground that the court lacked jurisdiction of the subject matter.

In the spring of 1940, the petitioner's assessors presented an inventory to the respondent's agent in New Hampshire, requesting the same be completed for the purpose of an assessment. The respondent corporation refused and it returned said inventory with a letter as follows:

"We believe after due investigation, that our equipment on our job at Franklin, N. H., is not taxable by the City of Franklin because of the fact that we are performing construction work on a United States Army Reservation." Finally an inventory was filed accompanied by a protest.

On August 1, 1940, the respondent corporation was notified of the tax assessment and subsequently it sent a check to the petitioner together with a letter of protest dated November 22, 1940 (Transcript of Record, Page 107, Exhibit No. 19A).

A protest was also written on the inventory filed for the year 1941 and again the respondent corporation was notified of the tax assessment on August 1, 1941. On November 17, 1941, the respondent forwarded its check in payment for taxes assessed by the petitioner's assessors accompanied by a letter of protest (Transcript of Record, Page 108, Exhibit 22A).

There is no evidence of restraint nor of seizure; in fact, the collector's conduct consisted simply of mailing the tax notices to the respondent corporation. (Transcript of Record, Pages 110-111, Exhibits 22A-23). The witnesses for the respondent asserted

they did not, nor did they know anyone else on behalf of the Coleman Bros., Corporation to ever file a petition for abatement in accordance with the laws of the State of New Hampshire or to ever institute an action against the petitioner as the result of either or both assessments or as the result of any payments of the demanded taxes.

There is no evidence of any demand having been made for a refund of moneys paid to the City of Franklin other than the institution of the present action.

#### JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked under the Judicial Code, section 240 (U.S.C.A. Title 28, section 347).

The action was instituted in the District Court for the District of New Hampshire and a final judgment was entered by direction of said Court on the 2nd of January, 1945, (Transcript of Record, pages 8 through 17).

Cross-appeals were taken to the United States Circuit Court of Appeals for the First Circuit (docket numbers 4085 and 4086). A decision from said Court was rendered on December 13, 1945. A motion by the City of Franklin to extend the time for filing application for certiorari to the United States Circuit Court of Appeals for the First Circuit was granted on March 13, 1946 extending the time within which to file said petitions for certiorari to and including April 15, 1946.

The District Court for the District of New Hampshire found that the statutory remedy in New Hampshire in cases of illegal assessment or over-assessment is exclusive and further found that the Coleman Bros., Corporation failed to fulfill the requirements of the laws of New Hampshire. The Statute referred to is New Hampshire Revised Laws, Chapter 77, sections 13 and 14:

- "13. By Selectmen. Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors. All applications for abatement shall be in writing.
14. By Court. If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of chapter 75, may, within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires."

However, inasmuch as the petitioner, City of Franklin, had no jurisdiction of the corporation or of the property of the respondent, said Court rendered a verdict for the respondent corporation in the sum of twelve thousand two hundred fifty seven (\$12,257.00) dollars, the amount paid by the respondent corporation, without interest. (58 Fed. Supp. 551)

The petitioner, the City of Franklin, requested the District Court to find that it had not consented to be sued nor have the statutes provided for such a suit as the instant case. The Court

was in accord with said request but it allowed the respondent corporation to remain in the Federal court under the theory that the City of Franklin had received money illegally obtained under the guise of a tax. (Transcript of Record, page 15)

The District Court did not grant the petitioner's, the City of Franklin, motion that (1) the payments made by the respondent corporation were voluntary and (2) the respondent corporation was estopped by its own conduct and was therefore guilty of laches.

Cross appeals were taken to the United States Circuit Court of Appeals for the First Circuit (Docket numbers 4085 and 4086). On December 16, 1945, a decision was rendered (152 Fed (2nd) 527) affirming the judgment of the District Court in favor of the respondent corporation and allowed interest on the verdict. (Transcript of Record, pages 115 to 124)

The decision of the United States Circuit Court of Appeals for the First Circuit contended that the respondent corporation had a remedy by abatement, of New Hampshire Revised Laws, Chapter 77, sections 13, 14 supra; however, such was not its exclusive remedy. Said decision held the payments on the part of the respondent corporation to have been involuntary and that it had seasonably brought its action.

### QUESTIONS PRESENTED

The petitioner, the City of Franklin, contends that the United States Circuit Court of Appeals for the First Circuit erred in failing to decide:

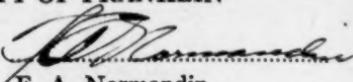
- (1) The statutory remedy (N. H. Rev. Laws, Chapter 77, Sections 13-14) to refund of taxes wrongfully collected is exclusive.
- (2) That the action was not maintainable in Federal Court; that the City of Franklin had not consented to be sued; that the statutes do not provide for suits as presented in the instant case.
- (3) That the payments made by the respondent, Coleman Bros., Corporation, to the petitioner, the City of Franklin, were made voluntarily.
- (4) That the respondent, Coleman Bros., Corporation, is estopped by its own conduct and is therefore guilty of laches.
- (5) That the respondent, Coleman Bros., Corporation, is entitled to interest.

The questions to which petition for certiorari is sought are of great public concern to the State of New Hampshire and are of grave importance to the City of Franklin; and they involve a conflict of decisions between the Circuit Courts of Appeal and the Supreme Court of the State of New Hampshire.

For and on account of the above reasons, the petitioner, the City of Franklin, prays that a writ of Certiorari, from the judgment of the United States Circuit Court of Appeals for the First Circuit hereinbefore described in the above entitled cause, be issued.

CITY OF FRANKLIN

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